Patent Office Professional Association
Box 15848, Arlington, VA 22215

STATEMENT OF

RONALD J. STERN

PRESIDENT

PATENT OFFICE PROFESSIONAL ASSOCIATION

Submitted to the

SUBCOMMITTEE ON COURTS, THE INTERNET AND INTELLECTUAL PROPERTY
COMMITTEE ON THE JUDICIARY
U.S. HOUSE OF REPRESENTATIVES

On The Subject Of

"Review of U.S. Patent and Trademark Operations, Including Analysis of General Accountability Office, Inspector General and National Academy of Public Administration Reports"

September 8, 2005

Mr. Chairman, Ranking Member Berman and Members of the Subcommittee:

Thank you for the opportunity to present the views of the Patent Office Professional Association (POPA) on operations at the U.S. Patent and Trademark Office (USPTO) and, in particular, on the recent reports of the Dept. of Commerce Office of Inspector General[1], General Accountability Office[2] and National Academy of Public Administration[3].

POPA represents more than 4,300 skilled patent professionals at the USPTO. The vast majority of our members are engineers, scientists and attorneys who, as patent examiners, determine the patentability of the hundreds of thousands of patent applications the USPTO receives each year. The patent professionals of POPA are diligent, highly skilled, hard working individuals firmly committed to maintaining the quality and integrity of the U.S. patent system.

The vital role of patents to the U.S. and global economies is without question. Their value is evidenced by the rapidly expanding efforts of inventors and companies to protect intellectual property throughout the world. The U.S. patent system is the engine that has driven innovation in America and helped produce the most powerful and robust economy in history.

Unfortunately, the USPTO has come under considerable criticism lately for failing to allow high-quality patents in a timely manner. This criticism has resulted in increased scrutiny of the day-to-day operations of the USPTO as well as review of the laws governing the patent system. Recently, several government studies and at least one book have been published that attempt to identify problems facing the USPTO today while proposing a variety of solutions for

[1] "USPTO should Reassess How Examiner Goals, Performance Appraisal Plans, and The Award System Stimulate and Reward Examiner Production," U.S. Dept. of Commerce Office of Inspector General Final Inspection Report No. IPE-15722, September 2004.
[2] "USPTO Has Made Progress in Hiring Examiners, but Challenges to Retention Remain," U.S. Government Accountability Office Report No. GAO-05-720, June 2005.
[3] "U.S. Patent and Trademark Office: Transforming to Meet the Challenges of the 21st Century," Report of the National Academy of Public Administration for the United States Patent and Trademark Office, August 2005.

those problems. Among the problems virtually all studies agree on are: the need to hire and retain a highly skilled workforce; improving the quality and timeliness of issued patents; and the ability for the USPTO to keep and use all its fees for its operations.

While POPA agrees that these are important issues facing the USPTO, it does not agree with many of the solutions proposed by some of these studies. Many proposed solutions represent radical changes to the patent system and go far beyond what is necessary to improve performance at the USPTO. Rather than a massive overhaul of the agency or a rewrite of the patent statutes, POPA believes that what is necessary is for the USPTO to go back to the basics of its mission – examining patent applications and issuing valid patents.

To improve the operations of the USPTO, Congress, USPTO management and its employees need to work together to provide sufficient time for examiners to examine patent applications, improve the tools that examiners use to identify relevant references ("prior art"), hire and retain a highly skilled workforce and improve labor-management relations.

A GOOD JOB TAKES TIME

"Faster, Better, Cheaper. Which two would you like?" This economic axiom is as applicable to patent examination as it is to any manufacturing process. The USPTO manufactures patents. But right now, it manufactures those patents in the high-stress environment of a "legal sweatshop." When it comes to patent examination you can take steps to get the job done faster or cheaper, but those steps will inevitably decrease the quality of the work. You cannot increase the quality of examination without providing examiners the necessary time to do the job.

The USPTO controls its throughput of patent applications using a rigorous goal-oriented production and workflow system that measures examiners' work output (production) in 6-minute increments. On average, a patent examiner has approximately twenty hours to complete the examination of a utility-type patent application. The agency has long recognized that technologies differ in complexity and that some examiners are more experienced than others. Primary examiners, those at GS grades 14 and 15 with authority to act independently, are expected to be much more productive than junior examiners requiring various levels of supervision. The current production system only allows some primary examiners in low complexity technologies as little as 11.2 hours per application. Even primary examiners in the most complex technologies are only allowed a maximum of 22.1 hours.[4] Examiners working on design-type applications or plant applications have even less time than those working on utility-type applications. On average, these examiners have about five to seven hours per application.

These agency production goals have remained essentially unchanged since they were put in place in 1976. Since that time, however, the nature of the work has changed considerably. Indeed, some technologies such as biotechnology, nanotechnology, bioinformatics, and business methods either were not patentable or did not even exist when these goals were put in place. Since 1976, patent applications have become more complex. Applications today often have larger specifications and higher numbers of claims than applications filed in 1976. Applicant-submitted information disclosure statements are often so large that they require storage in boxes. The increased complexity of patent applications has been recognized by both the USPTO and Congress as evidenced by the recent dramatic increases in fees for large specifications and excess claims.

[4] National Academy of Public Administration Report, August 2005, Appendix D, Table D-2.

Equally problematic is the massive explosion of information that patent examiners have to search through to identify relevant prior art. Almost two million new U.S. patents have issued just within the last fifteen years. The agency's database of issued patents grows by thousands every week. The USPTO will soon issue its 7,000,000th patent. Foreign patent literature is also growing at a comparable rate. The growth of these two sources of prior art pale by comparison to the explosion of information published in non-patent literature such as scientific and technical journals, trade magazines, catalogs, internet web pages and other publications that examiners search to determine the patentability of a claimed invention.

If these problems aren't enough for examiners, the agency's deployment of the Image File Wrapper System (IFW) has transferred a considerable amount of clerical work from the agency's technical support staff to the examining corps. Prior to IFW, patent applications were legal-size three-fold paper files that examiners worked on at their desks. All of the relevant papers were readily identifiable and readable. Now, with IFW, virtually all files are scanned copies of originally filed applications and only available electronically. Many examiners find these scanned files difficult to navigate through since individual papers are often difficult to identify. Thus, examiners now spend more time just trying to figure out what papers are in the application. More importantly, most examiners find the scanned images difficult to read on even the USPTO's high-quality computer monitors. They now spend their precious examining time printing out and collating documents on their desktop printers. Examiners repeatedly tell POPA that the IFW system alone is causing them from one to three hours of additional work on each application. Since the advent of the IFW "paperless office," paper usage has doubled at the USPTO.

Continuing problems with USPTO automation tools and the dramatic increase in paper usage were the impetus behind another Government Accountability Office report issued simultaneously with their report on USPTO hiring and retention problems cited above.[5] During focus group sessions held in conjunction with this investigation, examiners made the same complaints to Government Accountability Office investigators as they were making to POPA concerning USPTO automation. Most interesting is the fact that first line supervisors made similar complaints in their own focus group sessions. Since examiner goals have not changed since 1976, these additional hours must come from examiners taking shortcuts, cutting corners on searching and examination and putting in significant amounts of their own time (unpaid voluntary overtime) to get the job done. This results in a highly stressful "legal sweatshop" environment that ultimately leads to many examiners leaving the agency.

For years now, the USPTO has alleged that increased reliance on automation will help it do a better job of examining. When it comes to searching, the agency has placed all its eggs in the automation basket. It has all but abandoned support for the U.S. Classification System, a much-needed tool for adequately searching many technologies that are not readily searched by text searching automated tools. It has continuously refused to expend the necessary resources to properly integrate all issued patents into its text and image searchable patent database. It repeatedly fails to seek adequate input from examiners in the design and testing of hardware and software before deployment. The agency has spent well over a billion dollars on automated tools to assist examiners and yet the agency is being criticized for poor quality patents and an ever-increasing backlog of unexamined applications. This comes as no surprise to examiners.

[5] "Key Processes for Managing Patent Automation Strategy Need Strengthening," U.S. Government Accountability Office Report No. GAO-05-336, June 2005, pages 14-15.

No amount of automation can help an examiner read and understand a patent application and the prior art faster. This is not to say that the agency's efforts have been a waste of time and money. While many improvements are needed in the USPTO's automated tools as well as the U.S. Classification System, these tools do often allow examiners to identify relevant prior art. The problem is that there is so much more prior art to search, read and understand. This is what takes time. And this is what has not been addressed by the agency since 1976. Add to this explosion of prior art, the drains on examiners' time by the Image File Wrapper system and other added job duties, and it quickly becomes apparent how amazing a job the examiners of the USPTO really do under the circumstances.

Examiners are not asking for extravagant increases in their goals. A twenty percent increase in time will compensate examiners for the many duties that have been added to their jobs since 1976 and offset the increasing complexity of the entire examination process. It would help to relieve the stressful USPTO workplace and help reverse attrition. Most importantly, it will provide examiners with the time they need to do a better search and examination of patent applications.

For years, the agency has been collecting fees for excess claims and information disclosure statements, recognizing that these extra items will make examination of the application more labor intensive. But the agency has never passed those extra fees on to examiners in the form of additional time to examine the application. Simply insuring that the USPTO provide the additional time to examiners that patent applicants have already paid for will go a long way towards providing examiners with the time necessary to do the quality job that everyone desires.

It is important to recognize that providing extra time for examiners to do their job does not inherently translate into increased application pendency. Better searching and examination will increase the certainty of rejection of old or obvious ideas. As patent applicants realize this, they will be less likely to expend effort and resources on patent applications of questionable innovative or economic importance. Thus, better search and examination by USPTO examiners may actually limit application pendency over time.

Providing examiners with additional time should also benefit the entire nation by reducing the costs of patent litigation. In a recent study by the National Research Council of the National Academy of Sciences, John L. King calculated that providing examiners with a one-hour increase in time would cost the agency about $11.3 million. King calculated, however, that a one-hour increase in examiner time would reduce patent litigation expenses by over $17 million.[6]

Increasing the quality of patent examination, reducing patent application pendency and stimulating the nation's economy by reducing the costs of patent litigation thereby freeing up resources for other purposes, are clearly worthy goals of the intellectual property community. It should be equally as clear that providing examiners the time needed to do a good job is the most cost-effective means to accomplish these goals.

A GOOD JOB TAKES GOOD TOOLS

The major criticism on the quality of the USPTO's work revolves around the failure of examiners to find the most relevant prior art. But examiners only have a very few hours to

[6] King, John L., "Patent Examination Procedures and Patent Quality," *Patents in the Knowledge-based Economy*, National Research Council of the National Academies, National Academies Press, 2003, pages 54-73 at pages 68-70.

search the prior art and identify relevant references. They need search tools that allow them to search and find the most relevant prior art in the shortest possible time. Here again, the USPTO's heavy reliance on text searching has proven very shortsighted.

While planning the agency's new complex in Alexandria, Virginia, the USPTO made a conscious decision to eliminate support for the vast amount of examiner paper search files. These paper search files, known as "shoe files" or "the shoes" from early days when copies of issued patents were kept in shoeboxes, contained copies of the U.S. patents classified according to the U.S. Classification System. The paper search files also contained foreign and non-patent literature classified and placed in the shoes over the years by examiners in the various technologies. Many references in the shoes contained additional information such as examiner notes and/or color drawings placed there by experienced examiners to assist other examiners working in that technology. For many years prior to the advent of automated search tools, the paper search files represented the best and most comprehensive search tool for locating relevant prior art. They contained a remarkable wealth of information found nowhere else in the world.

The paper search files allowed examiners to draw from the experience of those examiners who had gone before. For many years, examiners were trained to "feed the shoes." Every pay period, examiners were given a stack of references such as technical and scholarly journals, trade publications, catalogs and other literature. An examiner would be provided time to peruse these references, identify those relevant to his/her technology, and place them in the appropriate paper search files according to the U.S. Classification System, i.e., "feed the shoes." In addition, examiners would often add notes and other helpful information to these references to aid themselves and others searching in a particular technology. This continuous process resulted in a comprehensive database of prior art only available to those at the USPTO. In addition, the very

act of feeding the shoes helped examiners to keep current on developments within their respective technologies. When new examiners searched the paper search files, they were receiving the benefit of the knowledge and experience of all those examiners who had preceded them in the technology. This helped new examiners develop familiarity with the prior art and helped all examiners in quickly and efficiently finding the relevant prior art for each patent application.

Regrettably, as far back as the mid-1980s, the USPTO began transferring classification duties from examiners to technicians. As time went on, management ordered that foreign patents and non-patent literature would no longer be included in reclassification projects. This rendered these documents all but useless for searching. By the mid-1990s, as planning for a new headquarters facility began in earnest, support for the U.S. Classification System and maintenance of the paper search files had virtually ended.

Today, the paper search files have all but disappeared at the USPTO. The agency removed all the copies of issued U.S. patents in preparation for its move to its new Alexandria, Virginia headquarters. While the remaining foreign and non-patent literature paper search files were moved to the new headquarters, no new references are being classified and placed in those files and their ultimate fate remains uncertain. At present, those files are stored in the basement of the new facilities but the agency is contemplating the removal of at least some of those files to free up critically needed space. Sadly, new examiners are not even formally trained to use the paper search files. The only formal agency training new examiners receive is in the use of the automated search tools.

The end result of the agency's failure to maintain the U.S. Classification System and the paper search files is that examiners can no longer benefit from the wisdom and experience of

prior examiners. Today, each search in a patent application is performed essentially from scratch. The agency's emphasis on text searching is resulting in a new generation of patent examiners inexperienced in the use of the U.S. Classification System.

Another major perennial frustration for examiners is the agency's continued unwillingness to expend the resources to complete the process of getting all issued patents into a single text searchable database. With the advent of the Automated Patent System in the mid-1980s, the USPTO began entering all new issued patents in both text and image searchable form into its issued patent database. Unfortunately, while all issued patents were entered in image format, the text-searchable database only goes back to about 1970. Issued patents prior to 1970 have not been entered in the database in a readily text searchable form. The agency did submit these older patents to optical character recognition but did not correct errors and did not index this database in the same manner as the Automated Patent System database. Thus, this database, referred to by examiners as the "dirty OCR file" because of its numerous errors, cannot be readily and reliably searched simultaneously with the Automated Patent System database. Examiners working in older technologies have to perform two searches of the issued patents to determine patentability of an applicant's claimed invention. This is one more uncompensated drain on examiners' time.

The current Administration has relied heavily on outsourcing many government duties. Indeed, many duties at the USPTO have been outsourced to private sector contractors. Rescanning and indexing the "dirty OCR file" so that all issued patents can be searched in one database is a duty begging for outsourcing. The agency has proposed a major initiative to outsource the entire search duties of examiners, an initiative of dubious merit, while not expending the resources to perform a one-time duty that would have clear positive results.

POPA believes the USPTO needs to reverse its virtual abandonment of the U.S. Classification System. It needs to improve its automated search tools to allow examiners to "feed the shoes" in an electronic environment, i.e., provide the means for classifying and adding relevant prior art to the USPTO's automated databases, and provide examiners the time to do so. This would once again allow examiners to benefit from the knowledge and experience of other examiners. The agency needs to actively seek the input of employees in the development and testing of automated tools to increase the likelihood of successfully deploying functional and efficient products. Finally, POPA believes the agency needs to do a better job of prioritizing all its automation expenditures to insure that the agency and the American people receive the maximum benefit from those expenditures.

A GOOD JOB TAKES A GOOD WORKFORCE

An agency can provide all the time and all the best tools available to do a top-notch job, but without a well-trained and dedicated workforce, those tools and that time will not be enough to get the job done. The need to hire, train and retain a highly skilled workforce has been a perennial problem for the USPTO. In their book, *Innovation and Its Discontents,* Adam B. Jaffe and Josh Lerner provide a brief history of hiring and retention problems at the USPTO dating all the way back to 1829.[7] As the authors recognize, however, this problem has become much more acute recently in view of the increasing importance of intellectual property in a global economy. A lack of adequate funding coupled with the feelings of some in the Senate that the USPTO should not try to hire its way out of its pendency problems resulted in sporadic and insufficient hiring of new examiners over the last ten years. Indeed, in FY 2003, the agency suspended

[7] Jaffe, A. B. & Lerner, J., *Innovation and Its Discontents*, Princeton University Press, 2004, pp. 133-138.

patent corps expansion altogether, choosing to hire only to compensate for attrition. This sporadic hiring process has left the agency with a significant shortfall of trained examiners and a burgeoning backlog of over 550,000 unexamined patent applications.

The USPTO's need to hire and retain new examiners has been the subject of several recent government studies. In 2002, the Dept. of Commerce Inspector General issued an illuminating report on needed improvements in the USPTO hiring process.[8] The Inspector General identified several challenges facing the USPTO in hiring new examiners: a shortage of potential examiners with the necessary technical training, competition for jobs by the private sector, compensation packages smaller than private sector compensation, and competition from other federal agencies.

The Inspector General also identified several significant reasons why examiners leave the USPTO. Seventy two percent of all examiners left the USPTO for one of the following reasons: dissatisfaction with the production-oriented nature and inflexibility of the job (26%); unsatisfactory performance or conduct (23%) and higher pay (23%). In POPA's experience, the vast majority of disciplinary actions at the USPTO are the result of unsatisfactory production or quality, i.e., performance issues. This has been confirmed by the National Academy of Public Administration Report of August 2005.[9] Therefore, most of the 23% of examiners in the second category are likely analogous to those who left because of the nature of the job. Thus, almost half of all examiners who leave the agency do so because of their dissatisfaction with the production-oriented culture of the USPTO.

[8] "Patent Examiner Hiring Process Should Be Improved," U.S. Dept. of Commerce Office of Inspector General Final Inspection Report No. BTD-14432-2-0001, March 2002.
[9] NAPA Report, August 2005, pages 110-111.

Of all examiners who leave the agency, approximately half leave within their first three years on the job, with thirty percent having less than one year's experience. POPA is aware of instances this year where new examiners have left the USPTO within the first several weeks in the agency. Of potentially greater impact, however, is that more and more mid-career employees are leaving the agency. In FY 2005, approximately forty percent of all those expected to leave will be employees with between three and fifteen years experience. Some of these employees are leaving without even having another job to go to. The agency's most serious problem is not hiring new examiners – it is keeping them.

Over the years, the USPTO has implemented a number of employee benefits such as special pay rates, alternative and flexible work schedules, a family friendly workplace and transit subsidies. While employees appreciate the many benefits offered by the USPTO, these benefits are not, by themselves, sufficient to overcome many employees' overriding dissatisfaction with the production-oriented nature of patent examining. The appeal of the USPTO's many benefits is in constant opposition with the unrelenting stress of the day-to-day "legal sweatshop" environment of the agency. As retention statistics show, the unrelenting stress of the job often trumps all the benefits of the agency and takes its toll on employees causing them to leave the agency voluntarily or, on many occasions, involuntarily.

The USPTO must constructively and effectively address this issue of job dissatisfaction or retention of examiners will remain a serious problem for the foreseeable future. The agency must accept the fact that examiners need more time to do the job or they will ultimately seek employment elsewhere. Training new examiners is both resource and time intensive. It takes about five to six years for an examiner to reach primary examiner status and act independently. It is primary examiners who are the most productive employees in the agency. It is primary

examiners who train and mentor new examiners. It is primary examiners who go on to become supervisory patent examiners and other management officials at the USPTO. POPA believes that it is cost effective to provide examiners more time to do their work so that the agency can retain those employees and benefit from their experience for years to come.

POPA is particularly concerned with the involuntary departure of employees through disciplinary actions by the agency. As the exclusive representative of patent professionals at the USPTO, POPA is often called upon to defend employees against agency allegations of poor performance or misconduct. And the USPTO keeps POPA very busy.

At a time when everyone is expressing serious concern about the USPTO's problems retaining examiners, the agency may well be the most ruthlessly effective single agency in the entire Federal government in removing its employees from the Federal workforce. In its August 2005 report, the National Academy of Public Administration published some very disturbing statistics on the agency's increasing number of performance-based disciplinary actions against employees.[10] In FY 2001, a total of 210 non-defense Federal employees were removed for poor performance in the entire Federal government. Eighteen of those 210 came from the USPTO. Almost ten percent of all employees fired for performance in the Federal government were fired by the USPTO! While the Federal government as a whole only fired 1in 5,000 employees, the USPTO was busy firing 18 in 3,000 patent examiners. The USPTO fired three times more employees in one year than the U.S. State Department did in seventeen years from 1984 to 2001 (six employees). This is a remarkable number of firings for a relatively small government agency.

[10] NAPA Report, pages 108-111.

The National Academy of Public Administration report had other equally troublesome statistics that demonstrate an alarming increase in performance-based disciplinary actions at the USPTO. The report shows that between fiscal years 2000 and 2005, the USPTO workforce grew from 6,367 to 6,763 employees, an increase of 396 employees. At the same time, the number of employee relations cases grew from 585 to 928. Incredibly, for those fiscal years, the USPTO took more than twice as many employee relations actions as the number of employees it had hired. For the USPTO patent corps, oral warnings, a form of disciplinary action immediately preceding a written warning, have gone from 70 in FY 1999 to 329 in FY 2004. Written warnings, a form of disciplinary action immediately preceding removal from Federal service, have risen from 19 in FY 2000 to 48 in FY 2004. As of February 2005, the USPTO had already issued 31 written warnings. From FY 1999 to the beginning of FY 2005, the USPTO fired 183 probationary employees – 5.7 percent of the 3,216 people hired. By comparison, for fiscal years 2001 and 2002, the Federal government as a whole only fired about three percent of new hires.

The USPTO's aggressive approach to employee relations is not lost on examiners. Rather than being beneficial to the agency, this approach further demoralizes its employees and heightens the stress in an already stress-filled workplace. The agency's willingness to terminate employees hangs like a sword of Damocles over the examining corps every day.

In their report, Academy investigators state that USPTO management attributes this astounding increase in personnel actions to liberalized time scheduling such as the Increased Flexitime Program that allows examiners considerable flexibility in their work schedules.[11] POPA finds this assertion laughable. Nothing in the Increased Flexitime Program changed one iota of examiners' production requirements. It does not matter when examiners are physically in

[11] NAPA Report, August 2005, page 108.

the office. What matters is that, when they are in the office, they have to produce. Management's assertion is simply reflective of its outdated perception that it must have more control over examiners lives.

This need for control is the same pervasive mentality that has significantly delayed the introduction of telework programs in the USPTO and throughout the Federal government. Contrary to the USPTO's assertion, the Increased Flexitime Program is one employee benefit that is actually doing what it needs to do – providing examiners a reason to stay at the USPTO. Sadly, at a time when the USPTO needs its employees the most, agency management has already signaled its intent to curtail this immensely popular program in upcoming contract negotiations.

If the Increased Flexitime Program is not the reason for so many personnel actions, what is? A brief review of recent USPTO history reveals several major events that have severely impacted examiners' ability to do their job in the allotted time: a change of USPTO administration; the implementation of the Image File Wrapper System; loss of the paper search files; disruption associated with the move to new headquarters; and the introduction of Quality Initiatives arising from the 21st Century Strategic Plan.

The USPTO's top-level management changed in 2001 concurrent with the change of the Presidency. The new management team under Director James Rogan took a decidedly more negative slant towards employee and labor relations. This new direction is clearly apparent in the linear increase in employee relations actions from FY 2001 to the present shown in Figure 4-3 of the Academy's report.[12] The "culture of collaboration" found in the previous USPTO administration quickly degenerated into a "culture of conflict" under Director Rogan. This,

[12] NAPA Report, August 2005, page 109.

dramatic change in USPTO culture resulted in a serious decrease in morale among USPTO employees.

In addition to the change of administration, the deployment of the Image File Wrapper system had considerable impact on examiners. As already discussed above, the Image File Wrapper system added significant time drains for examiners. Especially hard hit are examiners who have found the continuous use of computers necessary with the Image File Wrapper System to be very hard on them physically. Unfortunately, many of these examiners are among the most senior primary examiners and highest producers in the agency. The production of many of these senior examiners has suffered significantly using the Image File Wrapper system.

The loss of the paper search files also impacted many examiners. Some primary examiners were so familiar with the paper search files that they had memorized virtually every patent in their technology. This even included knowing in which shoe, i.e., file drawer, a particular patent was located. This enabled them to quickly search an application and rapidly determine the patentability of a claimed invention. With the loss of the paper search files, examiners now have to rely on the automated search tools to identify relevant prior art. The automated tools, however, do not readily lend themselves to the kind of familiarity with the art that many examiners had previously. Again, this has negatively impacted the ability of many examiners to get the job done in the time they are given.

Another significant impact on examiners has been the disruption in their daily lives associated with the USPTO's move to its new headquarters in Alexandria, Virginia. This move began in December 2003 and was finally completed in July 2005. During this time, examiners have experienced numerous power outages, computer network failures, complete shutdowns of the headquarters facility often preventing employees from doing additional work on weekends,

and the loss of many of the benefits and amenities present at the previous location in Arlington, Virginia. Doing a mentally intensive job such as patent examining does not lend itself well to such day-to-day disruptions in routines. Unfortunately, the USPTO is already outgrowing its new headquarters facility – something POPA had warned for years before the new facility was even built in Alexandria. Virtually all junior examiners are being doubled up in offices. The agency is actually contemplating training new examiners at an "undisclosed location" away from the headquarters facility for their first six to eight months because it does not have adequate space to house them nor does it have sufficient numbers of primary examiners in critical technologies to train them. Once again, patent examiners are being expected to continuously pay for the shortsighted decisions of USPTO management.

Finally and, arguably, most significant has been the profoundly negative effect on examiners due to the implementation of the Quality Initiatives of the USPTO 21st Century Strategic Plan. The Quality Initiatives represent a number of initiatives such as "recertification of primary examiners," "in-process reviews" and "second pair of eyes" intended to improve the quality of examination. The Quality Initiatives have taken the "culture of conflict" at the USPTO to new extremes and seriously impacted examiner morale. Indeed, a number of examiners have resigned or retired from the agency rather than put up with this management assault on their integrity and professionalism.

For many years, agency management made it clear to employees that production was "Job One" at the USPTO (apologies to Ford Motor Co.). Quality was a distant second. Supervisors made sure examiners understood that as long as their production was high enough, they could be fairly certain that their jobs were secure. At the USPTO, quantity far exceeded quality in importance. Examiners knew that, to maintain a healthy production level, that

shortcuts would have to be taken and corners cut. This was not a problem so long as production remained "Job One."

With the introduction of the 21st Century Strategic Plan, however, management suddenly reversed direction and promised Congress and the entire intellectual property community that quality was now going to be "Job One" at the USPTO. Suddenly, all the shortcuts examiners had learned and all the corners they had cut in order to get the job done had all but evaporated. Management implemented the Quality Initiatives but, once again, made no adjustments to examiners' goals to allow for this sudden change in emphasis.

Today, examiners at every level of experience are finding themselves angry, frustrated, insulted, bitter and fearful for their jobs. They are looking over their shoulder constantly for fear that reviewers will allege an error in their work. If all the other stresses in the USPTO workplace weren't enough, the Quality Initiatives may well be the proverbial straw that broke the camel's back.

It is no secret that patent examining is an inherently subjective undertaking. If it weren't, there would be little need for applicants and courts to expend so many resources on patent litigation. Two highly skilled and experienced examiners can look at the same patent application and reasonably come to different conclusions on the merits of the case. A patentee and a potential infringer will very likely interpret the issued patent differently.

Just because two reasonable people disagree on something does not make one wrong and the other right. Unfortunately, this fact is often overlooked by USPTO management during the numerous review processes currently in place. Today, an examiner's decisions are being constantly criticized by reviewers who, as often as not, have little familiarity with the examiner's particular technology. If the examiner does not want to be charged with an error, the examiner

must spend a great deal of time defending the action. Many alleged errors of examiners are actually nothing more than a subjective difference of opinion between two patent professionals. At mid-year of FY 2005, forty percent of reviewers' alleged errors were being reversed by the USPTO once the examiner defended the action. Unfortunately, by the time the error is reversed, both the examiner and the agency have lost the production time and the agency now has an angry demoralized examiner on its hands. While POPA certainly supports improving the quality of patent examination, examiners believe the agency's implementation of the Quality Initiatives is not the best way to achieve it. POPA believes the Quality Initiatives are doing far more harm than good.

All the issues discussed above are adversely affecting examiners ability and desire to do the job. Any one of these events would impinge on examiners' time to do the work, but each one by itself might not be sufficient to convince an examiner to leave the agency. Unfortunately, all of these events are occurring relatively concurrently and, taken together, have left the examining corps angry and stressed. The effects of these events are being manifest by rising attrition and alarming increases in personnel actions at the USPTO. If the agency does not take steps quickly to reverse these effects, POPA believes that the situation will only get worse.

WHAT DOES AND DOESN'T NEED TO BE DONE

Everyone in the intellectual property community agrees that there are significant problems at the USPTO that need to be fixed. Unfortunately, many of the proposed solutions will have no effect on those problems and may well fall victim to the law of unintended consequences.

To a great extent, the USPTO is a victim of its own success. As the importance of intellectual property has grown, so has the work of the USPTO. When Ford Motor Company released the Mustang in 1964, the new car was an overnight hit. Did Ford sit back and tell potential buyers that they would have to wait two or more years for a new Mustang. No! The company ramped up production as fast as it could, built additional facilities where necessary and did whatever was needed to sell as many Mustangs as it could as fast as it could. Today, the USPTO finds itself in the same position as Ford did in 1964. It has a hit product, the patent, but a shortage of manufacturing capacity to meet demand.

Despite an ever-increasing backlog of unexamined applications and continuous urging from POPA, agency management did not see fit to expend its resources where they would do the most good – expanding the workforce to meet demand. Fortunately, after years of inadequate hiring this is changing. Recognizing the need for more examiners, Congress has mandated minimum staffing levels in FY 2005 and is on the verge of approving further increases for FY 2006. After years of dispute over the diversion of USPTO fees, the agency has finally been allowed to retain its fees for its own needs. POPA applauds these positive actions and hopes that they will continue in the future.

Having the necessary resources and using them effectively are two very different things. This is one area where POPA takes issue with some solutions proposed by the Dept. of Commerce Inspector General and the National Academy of Public Administration.

Contrary to the findings of the Inspector General, the agency does not need to rethink examiners performance plans. If examiners' jobs were as easy as the Inspector General's report implies, the USPTO would not have the attrition problems we are discussing today. It does not need to replace its current awards system with one that is either unattainable by a majority of

employees or would reduce examiners' time per application even more. It needs an award system that will encourage even more examiners to strive for an award. Examiner awards are easily one of the most cost effective means at the agency's disposal for increasing production and reducing pendency.

Contrary to the National Academy of Public Administration, the USPTO does not need more flexibility in managing its workforce. The USPTO is very effectively managing many examiners right out the door. It is already bypassing employees' civil service rights and extending its ability to summarily remove new employees to two or three years by using the Federal Career Intern Program as a subterfuge for standard Federal hiring practices. Instead, it should be using its creative energies to make sure that new employees are well trained and engaged in the workplace.

The USPTO does not need to gain more power to limit the activities of its labor unions. It needs to work with its unions to empower employees and tap into the wealth of knowledge, skills and experience of its workforce. When POPA and the USPTO work together as a team instead of fight each other as adversaries, we increase the likelihood of improving employee morale and solving retention problems.

The USPTO does not need to isolate its new examiners in some off-site facility where they have little interaction with other examiners in their technology. Examining has a very steep learning curve and new examiners need exposure to many examiners to learn and understand that there can be many right ways to approach the job. Instead, the USPTO should be immediately acquiring more space to allow expansion of the agency to meet its hiring needs. It is possible that much of the agency's old space in Arlington is still available and could be rented. This space is already wired and configured for USPTO use.

The USPTO does not need to spend countless resources negotiating a new collective bargaining agreement that reduces or eliminates many of the benefits and protections employees currently enjoy. This will only serve to antagonize employees and make even more of them explore other employment options. When you need every employee you can get, angering and demoralizing your workforce is not effective management. Instead, the USPTO should respect its employees and honor both the spirit and the letter of its existing collective bargaining agreements.

This Subcommittee can also help to insure that the USPTO targets its resources to its basic mission of examining. POPA recommends that you amend 35 U.S.C. §42 by including in H.R. 2791 a provision that requires the agency to use all of the excess claims fees, excess specification fees and information disclosure fees to fund additional examining time for examiners to do the extra work for which applicants are paying the fees. In Section 42, Congress has instructed the USPTO to limit the use of trademark fees for the examination of trademark registrations. It is time to expand that precedent to patent fees.

Mr. Chairman, Members of the Subcommittee, the USPTO has one of the most highly skilled and dedicated workforces in the Federal government. Every examiner is a college graduate trained as an engineer or scientist. Many have postgraduate degrees and/or law degrees. They have other employment options if they choose.

If the USPTO truly desires to reduce attrition, it must effectively address the reasons that most examiners leave – job dissatisfaction and higher pay. It must recognize that examiners are skilled professionals and deserve to be treated as such. It must realize that, as professionals, examiners want to do a good job they can be proud of. It must give them the time, the tools and the space to do that job. It must pay them a reasonable and competitive salary that, coupled with

the many other benefits at the agency, will make the USPTO a much more desirable workplace. It must reestablish its credibility with employees by honoring its collective bargaining agreements. It must return to a culture of collaboration, not a culture of conflict.

Unless and until the USPTO addresses these problems, the revolving door of attrition will continue to spin.